United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/900
20 November 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 900

Case No. 973: SALMA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas at the request of Maria Salma, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 May 1997, the time-limit for the filing of an application to the Tribunal;

Whereas, on 7 May 1997, the Applicant filed an application requesting the Tribunal, inter alia:

"...

(a) *To rescind* the decision of the Secretary-General by which he rejected the unanimous recommendation of the JAB that the Applicant be awarded six months net base salary in compensation for the denial of her rights to be accorded fair and up-to-date performance reports;

(b) *To find and rule* that the Joint Appeals Board erred as a matter of law and equity in failing to find the existence of harassment and discrimination against the Applicant and to provide appropriate and adequate compensation ...;

(c) *To order* that the Applicant be paid an additional amount equivalent to the value of the two longevity steps which had previously been withheld;

(d) *To order* that the Applicant be given due consideration for promotion to the P-4 level retroactive to 1991;

(e) *To award* the Applicant three years' net base pay and whatever other appropriate compensation is determined by the Tribunal ...;

(f) *To fix* ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(g) *To award* the Applicant as costs, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 3 June 1998;

Whereas the Applicant filed written observations on 29 September 1998;

Whereas, on 12 October 1998, the Respondent filed comments on the Applicant's written observations;

Whereas, on 30 October 1998, the Applicant submitted an additional document;

Whereas, on 10 November 1998, the Tribunal put questions to the Respondent, to which he responded on 11 November 1998;

Whereas, on 13 November 1998, the Applicant submitted comments on the Respondent's 11 November submission;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 22 March 1965, on a three-month fixed-term appointment as Guide Trainee with the Department of Public Information (DPI). Her appointment was extended, and on 19 September 1967, the Applicant was transferred to the Office of Conference Services as Conference Officer at the G-3 level. She separated from service on 20 December 1967. The Applicant re-entered the

service of the UN on 15 January 1968, as a Bilingual Clerk, at the G-3 level, in the Office of Public Information. On 1 May 1968, the Applicant was transferred to UNDP, where she received a permanent appointment on 1 May 1969. She was promoted to the G-4 and G-5 levels on 1 April 1971 and 1 January 1975, respectively. The Applicant transferred to the UN Department of Conference Services on 1 April 1976, on a fixed-term appointment at the P-2 level, having been assigned from UNDP to that department starting 13 October 1975. After receiving a permanent appointment on 1 February 1980, she was promoted to the P-3 level, as Editor, on 1 April 1980. On 16 June 1980, the Applicant transferred to DPI as Information Officer. From 23 June to 20 November 1989, the Applicant was temporarily assigned to UNTAG, Namibia, as Electoral Supervisor. From 22 June 1995 to 25 February 1996, she was temporarily assigned to the Mission Civile Internationale en Haïti (MICIVIH) as Human Rights Observer. She separated from service upon retirement on 31 May 1996.

On 30 July 1991, the Chief, Central News Section informed the Director, Information Products Division (IPD), DPI, that the Applicant refused to follow his instructions with respect to her work assignments. On 12 August 1991, the Director, IPD, DPI, and the Chief, Central News Section, met with the Applicant to discuss her duties and responsibilities in the Central News Section.

From 14 August 1991 to 22 October 1992, the Applicant was on certified sick-leave. On 19 October 1992, the Applicant requested the Senior Personnel Officer, Office of Human Resources Management (OHRM), and the Acting Executive Officer, DPI, to transfer her out of the Central News Section and to reassign her to any available assignment within DPI, but not in IPD. On 23 October 1992, the Acting Executive Officer, DPI, informed the Applicant that she had been reassigned to the Yearbook section.

On 3 November 1992, the Applicant informed the Acting Executive Officer, DPI, that she felt that she had been the object of discrimination by the Director, IPD, but that she agreed to the decision concerning her reassignment 'for the time being' despite the stressful

nature of the new assignment. The Applicant took up her duties with the Yearbook on 4 November 1992.

On 14 December 1994, the Director, Media Division, DPI, requested the Executive Officer, DPI, to return to the Central News Section the P-3 post on loan to the Yearbook Section. On 30 December 1994, the Deputy Executive Officer, DPI, informed the Executive Officer, DPI, as follows:

> "The supervisors whom [the Applicant] had accused of discrimination against her are no longer in the Media Division and therefore it would seem that there is no impediment for her to return to the Central News Section as [the Director, Media Division, DPI,] has requested."

On 27 January 1995, the Executive Officer, DPI, informed the Applicant that she was to report for duty with the Central News Section, Media Division, effective 1 February 1995.

On 2 February 1995, the Chief, Central News Section, notified the Executive Officer, DPI, that the Applicant had not reported for duty on 1 February 1995 as instructed, and that she had not informed him or anyone else in the Section of the reason for her absence.

In a Note for the File dated 21 February 1995, the Executive Officer, DPI, described a meeting held with his Deputy and the Applicant. During this meeting, the Applicant "stated categorically that she would not comply with the instruction" to report to duty with the Central News Section, requesting instead "a little time to try and obtain a mission assignment." The Applicant was advised that the Department would assist her in obtaining a mission assignment but that, in the interim, she had to report for duty as instructed. The Applicant did not report for duty.

On 6 March 1995, the Executive Officer, DPI, reminded the Applicant that she had been instructed to return to her former post in the Central News Section. The Executive Officer, DPI, further informed the Applicant, "unless you return to take up your functions

in the Central News Section immediately, the Department will have no alternative but to take disciplinary action against you."

On 8 March 1995, the Applicant, through a representative, informed the Executive Officer, DPI, that she would request a review of the decision to reassign her and that pending such a review, the Applicant would not report to the Central News Section.

On 13 March 1995, the Applicant requested administrative review of the decision to reassign her to the Central News Section, complaining of harassment and the refusal of her supervisors to complete her PERs for the prior nine years.

On 14 March 1995, the Director, Media Division, DPI, wrote to the Assistant Secretary-General, OHRM, recommending that the Applicant be separated from service for abandonment of post. The Applicant was informed on 4 April 1995, by a Personnel Officer, OHRM, that OHRM would not act on the Department's recommendation "since no provisions of the ST/AI/400 apply to her current situation."

On 23 May 1995, DPI released the Applicant on mission assignment. The Applicant was assigned to MICIVIH from 22 June 1995 to 25 February 1996.

On 11 June 1995, the Applicant lodged an appeal with the JAB.

On 24 October 1996, the JAB adopted its report. Its considerations and recommendation read as follows:

"**Considerations**

41. The Panel first dealt with the Respondent's contention that all the issues in the appeal other than her reassignment to the Central New Section, could not be considered because they were time-barred, the Appellant having failed to act within the time limit of staff rule 111.2.

42. The Panel noted that the UN Administrative Tribunal has recognized that where a claim relates to a pattern of harassment or other conduct spread over a period of time, it is not barred because individual incidents in the pattern were not challenged within the time limits applicable to them.

43. The Panel therefore considered the allegations of harassment but did not find that sufficient evidence had been supplied to prove its existence. It was evident that there were disagreements related to the staff member's assignment between her and her superiors and that because of them the relations between them were strained. However, the mere fact that the Appellant considered her assignment to the Central News Desk as unacceptable, did not constitute harassment.

44. Similarly, the withholding of two longevity steps does not signify a denial of Appellant's rights, as the award of longevity steps is conditional on the staff member's overall satisfactory service. This relates not only to the quality of the staff member's performance but also to conduct during the relevant period. Both are subject to the judgement of the staff member's superiors.

45. On the other hand, the Panel found that the failure over a long period of time to supply PERs for the Appellant's service was violation of the applicable rules, depriving the staff member of the possibility to receive proper consideration for promotion or change of assignment.

46. As it is the duty of the Administration to see to it that PERs are prepared regularly and on time, failure to do so entitles the applicant to compensation.

Recommendation

47. The Panel therefore recommends unanimously that the Appellant be paid compensation equivalent to six months net base salary, as at the time of her separation from service, for the denial of her rights."

On 27 November 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the finding of the Panel that sufficient evidence had not been supplied to prove the existence of harassment and that the withholding of two longevity steps did not signify a denial of your rights. He has noted the finding of the Panel that performance evaluation reports (PERs) for your service had not been prepared over a long period of time depriving you of the possibility to receive proper consideration for promotion or change of assignment. He has also noted the unanimous recommendation of the Panel that you be compensated in the

amount of six months net base salary at the rate at the time of your separation from service.

The Secretary-General has decided to accept the findings of the Panel but not the entirety of its recommendation. He has decided to compensate you in the amount of $500.00 for the fact that your PERs were not prepared over a long period of time affecting your possibility to receive proper consideration for promotion or change of assignment."

On 7 May 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB erred when it failed to find evidence of discrimination.

2. The Respondent's failure to prepare PER's for the Applicant for nearly ten years is clear evidence of an abuse of authority and of discriminatory treatment.

Whereas the Respondent's principal contentions are:

1. Reassignment of the Applicant back to the Central News Section, DPI, was within the discretionary authority of the Administration and did not violate her rights, nor was it arbitrary or discriminatory.

2. The Applicant's other pleas are not properly before the Tribunal because her request for review did not include those claims and, in any case, they are time-barred.

3. The Applicant has been adequately compensated for irregularities concerning her performance evaluation reports.

4. The Applicant's request for the award of costs is without merit.

The Tribunal, having deliberated from 28 October to 20 November 1998, now pronounces the following judgement:

I. The lengthy written submissions by the parties, along with their responses to the questions put by the Tribunal during the proceedings, were sufficient to render an oral hearing unnecessary in this case.

II. The Applicant, who has now retired from UN service, appeals from a decision of the Respondent to award her $500 as compensation for the failure over a period of years to conduct performance evaluation reports (PERs). According to the Applicant, this failure deprived her of the right to receive proper consideration for promotion or change of assignment. In addition, the Applicant's other principal request is that the Tribunal order the Respondent to pay to the Applicant the value of two longevity steps. According to the Applicant, these too were denied her due to the Respondent's failure to provide PERs and as a result of harassment and discrimination by her supervisors. Finally, the Applicant requests that the Tribunal order that she be considered as having been promoted to the P-4 level with retroactive effect from 1991.

III. First, the Respondent contends that the Applicant's arguments relating to harassment by her supervisors, denial of her within-grade salary increment in 1991, and failure to promote her in 1991, are time-barred. With respect to the Applicant's allegations concerning harassment, it is clear from the documentation on file that there was ongoing friction between the Applicant and her supervisor. In this regard, the Tribunal concurs with the JAB's finding that "the Panel therefore considered the allegations of harassment but did not find that sufficient evidence had been supplied to prove its existence. It was evident that there were disagreements related to the staff member's assignment between her and her superiors and that because of them the relations between them were strained. ..."

In addition, the Tribunal is satisfied from the record that the Applicant, by her apparent unwillingness to cooperate with her supervisors and her refusal to recognize their authority, also may have contributed to the strained relations. With regard to her claims for

non-promotion and denial of within-grade salary increment, the Tribunal considers that they are time-barred since the Applicant did not initiate the review and appeals process within the time limits prescribed in the rules.

IV. The file reflects that there were numerous irregularities in the handling of assignments and PERs for the Applicant. In December 1991, the Applicant was eligible for a longevity step increase. It was denied, in the Tribunal's view, as a result of the absence of a PER and the existence of a negative memorandum regarding her conduct that had been prepared by a newly promoted supervisor who had been in the position for only a few months. The Applicant asserts that the supervisor, a former colleague of the Applicant's, intended to harass her. The Tribunal notes that, at the time the negative memorandum was written, a draft PER signed by the First Reporting Officer, rated individual categories of her performance as either "excellent" or "very good". However, this document was not in the file because it had not been completed.

V. Following the denial of the longevity step, the Applicant lodged a complaint with the Panel on Discrimination and Other Grievances, which, however, failed to resolve the issue. The following years of the Applicant's tenure show a troubling pattern of the Applicant failing to report for assignment.

VI. On 14 August 1991, the Applicant went on certified sick-leave for 14 months. In March 1995, her supervisor recommended that she be considered as having abandoned her post. The Administration rejected this recommendation. Between 1989 and 1996, the Applicant volunteered for and served on a number of field missions. The Respondent argues that the absence of PERs, covering the period 1986-1996, was a result of her being detailed to field missions in which she should have been evaluated by a different

department, and that the failures to prepare PERs were not a result of any animus by the Respondent.

VII. The Tribunal has emphasized the need for the Administration to respect the rights of staff to have timely PERs available for consideration in decisions regarding promotion (cf. Judgements No. 198, Lane (1975), No. 412, Gross (1988), and No. 539, Bentaleb (1991)). The right exists also in regard to consideration of a staff member for reassignment. The Tribunal is in agreement with the JAB and the Secretary-General in finding that the failure to provide PERs over a period of about ten years disadvantaged the Applicant in her attempts to secure other posts. The Tribunal decides that the Applicant should be compensated for this violation of her rights. It considers, however, that $500 is insufficient for that purpose.

VIII. The Tribunal is also of the view that the lack of a PER for the period 1986 through 1990, was the principal reason for denying her the longevity step due in 1991. The Tribunal does not agree that the supervisor's negative memorandum should have been given more weight than the draft PER, and thus finds that the Applicant should have received the increase in 1991. The Tribunal decides that this injury must also be redressed. On the other hand, the Tribunal is not persuaded that the Applicant would have received the second longevity step if PERs had been completed during the period 1990 through 1996.

IX. The Tribunal orders the Respondent:

(1) To pay to the Applicant an amount equivalent to the longevity step increase for which she was eligible in 1991;

(2) To pay to the Applicant the amount of three months net base salary at the rate in effect on the date of her separation from service.

The above amounts are to be paid in addition to the $500 she has already received.

X. The Tribunal rejects all other pleas, including the Applicant's request for costs.

(Signatures)

Mayer GABAY
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary